

**APPLICANTS: BBW Partnership and
Fallston Commercial Subdivision
Property Owners Association, Inc.**

**BEFORE THE
ZONING HEARING EXAMINER**

**REQUEST: A variance to operate
housing for the elderly on less than 10 acres
in the B3 District**

**FOR HARFORD COUNTY
BOARD OF APPEALS**

HEARING DATE: April 7, 2004

Case No. 5407

ZONING HEARING EXAMINER'S DECISION

APPLICANT: BBW Partnership

CO-APPLICANT: Fallston Commercial Subdivision Property Owners Association, Inc.

LOCATION: 2310 & 2312 Belair Road, Fallston
north side of Belair Road (U.S. Route 1), east of Mountain Road
(MD Route 152)
Tax Map: 55 / Grid: 3C / Parcel: 272
Third Election District

ZONING: B3 / General Business

REQUEST: A variance pursuant to Section 267-49A(1) of the Harford County Code to
allow a Housing for the Elderly use on less than the required 10 acres
(4.82 acres proposed).

TESTIMONY AND EVIDENCE OF RECORD:

Prior to the beginning of testimony by the Applicant, the owner of adjoining 2308 Belair Road, through its counsel, appeared and indicated that it had no opposition to, and supported, the requested variance.

For the Applicant testified Morris Wolf, who identified himself as a principal of BBW Partnership. Mr. Wolf explained that this request is necessary as the subject parcel size is less than the required 10 acres in size. According to Mr. Wolf, the Applicant owns Lots 3 and 4, as shown on that plat entitled "Variance Plan for Fallston Condominiums Residential Community" and marked as Attachment 3 to the Staff Report. The Applicant also owns Lot 2, which adjoins Belair Road, and on which is planned future commercial development. Lot 2 is not a part of this variance request. Furthermore, the Co-Applicant, Fallston Commercial Subdivision Property Owners Association, Inc., of which the Applicant BBW Partnership is a controlling member, owns the storm water management parcel and the private road parcel, also as shown on the "Variance Plan for Fallston Condominiums Residential Community". Lots 3, 4, the storm water management parcel, and the private road parcel are the subject matter of the zoning request, and in total contain approximately 4.820 acres.

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According to Mr. Wolf, the Fallston Commercial Subdivision Property Owners Association, Inc. was formed to manage the storm water management facility, and is controlled by the owners of the surrounding lots, which consist of BBW Partnership and the owner of Lot 1 on which is located the existing Denny's restaurant. The Fallston Commercial Subdivision Property Owners Association, Inc. association documents also require the owner of Lots 3 and 4 - which is BBW Partnership - to maintain the private road. Because of its majority ownership interest, BBW Partnership actually controls the Fallston Commercial Subdivision Property Owners Association, Inc.

The Applicant plans four (4) age-restricted condominium buildings on the subject property, containing twelve (12) residential units each. Each unit will have covered parking on the first floor, with three additional residential floors. The project's appearance will be in conformity with other buildings in the neighborhood. The developer, builder, and condominium association will enforce the age restriction requirement.

Mr. Wolf explained that the denial of the variance would cause practical difficulty because the project cannot be developed without the variance. No other land is available, and the project meets all other requirements. Mr. Wolf explained that the proposal is a fairly benign use. There are many other uses which could go into a B3 District which would harm the neighborhood.

Mr. Wolf explained that the Applicant agreed to accept all conditions proposed by the Department of Planning and Zoning, except it cannot agree to the proposed condition which requires a lot consolidation of the roadway and storm water management facility with Lots 3 & 4, as this cannot be done due to the varying ownership.

On cross-examination Mr. Wolf testified that the 4.82 acres of the site includes both the storm water management facility and the existing private road. The storm water management facility is to be greatly improved, although it was originally built to service all lots. Public water and sewer is available to the project, and in fact an easement has been granted to the County to allow water and sewer to be brought to the property.

Mr. Wolf observed that there is a large demand for this type of housing in Harford County. The residents of the proposed age-restricted community will be able to walk to Mr. Wolf's planned commercial buildings on Lot 2. There will be a sidewalk along the private drive to U.S. Route 1. He would like to have a variety of services in the new stores on Lot 2. Mr. Wolf believes that most of the residents will have cars. One of the proposed age-restricted buildings will have a recreation area. A walking trail will also be installed on the property.

A traffic study has been prepared for the planned commercial space on Lot 2.

The owners of the condominium units, and the other lot owners, will all be required to maintain the storm water management facility and private road. Mr. Wolf believes that the proposed buildings will conform to the other buildings in its neighborhood.

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Next for the Applicant testified Tim Whittie of MRA, Inc. Mr. Whittie was offered and accepted as an expert civil engineer. Mr. Whittie indicated that he had prepared the site plan for the proposed project. The property is zoned B3, with four (4) buildings of twelve (12) units each planned. The proposed forty-eight (48) units are considerably less than the sixty-seven (67) units which the Code allows to be built. Mr. Whittie indicated that the first level of each building would be covered parking, with a total of fifteen (15) parking spaces under each building. An additional sixty-nine (69) parking spaces will be built on site for a total of one hundred twenty-nine (129) spaces on site. This greatly exceeds the Code requirements of twenty-four (24) spaces.

There will be twenty (20) foot buffer yards along the western and northern boundary line. Existing vegetative screening will be maintained and improved. Lighting on the property will be subdued and low-key. Public water will be brought to the site. The Code requires no more than a thirty percent (30%) maximum building coverage, which the project will meet. Mr. Whittie indicated that the property will include passive and active open space. The project will meet or exceed all applicable zoning regulations.

On cross-examination, Mr. Whittie testified that the storm water management facility would be re-graded and re-engineered. The height of the proposed buildings would be greater than those of surrounding structures. If an entire 10 acre site were being used, Mr. Whittie could not say for sure if there would be more open space between the two buildings. There are too many variables.

Next for the Applicant testified Lee Cunningham of Lee Cunningham and Associates, offered and admitted as an expert in land use and transportation planning. Mr. Cunningham is familiar with the subject property and the Harford County Development Regulations. He stated that the project complies with the requirements of Section 267-49, Housing for the Elderly, except for lot size. Mr. Cunningham then stated that accessory uses are not necessary with this product, which is really age-restricted housing, not housing for the elderly. The expected population of the project will be vigorous, and will not really need accessory uses on site. There is no Code requirement for accessory uses.

Mr. Cunningham feels the property is unique, and presents practical difficulty, because the property is irregular in shape, and is zoned B3 while the surrounding properties are residentially zoned and residentially developed. Accordingly, Mr. Cunningham concluded the property is unique. He further stated that while the property could be suited for some commercial uses, those uses would be difficult because of surrounding residential uses. The property is not suitable for many residential uses. The proposed project will be benign and a beneficial use.

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Mr. Cunningham had performed a traffic impact analysis. His conclusions were that the traffic to be generated by the proposed housing for the elderly project would be substantially less than other uses of the site. If 10 acres were available for the project, the setbacks and allowable density would be the same as proposed project. Mr. Cunningham testified the height of the proposed buildings would be greater than surrounding properties. He believes that the conditions proposed by the Department of Planning and Zoning are appropriate, although there is no need to combine the parcels into one large parcel, as proposed by the Department.

Upon cross-examination, Mr. Cunningham stated that he had done traffic counts at similar projects, and believed that his projections for the proposed project are accurate. He feels that the residences will generate, during the peak morning hour, fourteen (14) trips per hour, and during the peak evening hour, eleven (11) trips per hour. These numbers were consistent with other studies which he had performed. His trip projections did not include internal accessory services being available on site so that every service or need had to be driven to. On re-direct Mr. Cunningham indicated that the property's proximity to Denny's, a high turn-over restaurant, is also a factor which makes the property unique.

Next for the Department of Planning and Zoning testified Anthony McClune. Mr. McClune and his Department have reviewed the request. The Department is of the opinion that the property is unique. Mr. McClune stated the property is zoned B3, but is bordered on one side by commercial and on three sides by both residential zoning and uses. The project meets or exceeds all housing for the elderly requirements, except the minimum acre limitation. Mr. McClune also feels that the proposed project is an appropriate transition from commercial to residential land uses.

The project is compatible with residential uses, and he does not believe that the height of the project is an issue or will adversely effect other properties. Most other similar projects in Harford County do not contain internal accessory services for residents.

The Department of Planning and Zoning recommended that a proposed condition of approval be that a final plat be submitted for recordation which consolidates all lots. Mr. McClune expressed a concern of the Department as being that residents hold title to all the property involved. If the residents are also members of the Fallston Commercial Subdivision Property Owners Association, Inc., and are accordingly able to exercise ownership control of on site facilities, then the Departments requirement that the consolidated plat be recorded is not necessary.

Mr. McClune and the Department feel that traffic impact is not an issue. Residential projects of this type would generate much less traffic than commercial projects. When asked about the 10 acre requirement, Mr. McClune stated its purpose is to protect proposed adjacent residential users from the impact of intensive commercial uses. It is to provide an available buffer to residential uses from surrounding commercial uses. This is not a factor in the case before the Board as the property is virtually surrounded by residential uses.

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In opposition testified Boyd Herron of 203 Mountain Road. Mr. Herron, whose property borders the proposed site, is concerned about the location of the proposed dumpster and does not want it close to his property. He is also concerned about run-off, and wants to keep as many trees along the periphery of the property as possible. If these concerns are met, he would have no objection to the project.

Next in opposition testified Patricia Dallam. She does not object to the use as such, but generally believes variances of this type should not be granted.

APPLICABLE LAW:

Section 267-11 of the Harford County Code allows the granting of a variance to the requirements of the Code:

“Variances.

- A. Except as provided in Section 267-41.1.H., variances from the provisions or requirements of this Part 1 may be granted if the Board finds that:*
 - (1) By reason of the uniqueness of the property or topographical conditions, the literal enforcement of this Part 1 would result in practical difficulty or unreasonable hardship.*
 - (2) The variance will not be substantially detrimental to adjacent properties or will not materially impair the purpose of this Part 1 or the public interest.*
- B. In authorizing a variance, the Board may impose such conditions regarding the location, character and other features of the proposed structure or use as it may deem necessary, consistent with the purposes of the Part 1 and the laws of the state applicable thereto. No variance shall exceed the minimum adjustment necessary to relieve the hardship imposed by literal enforcement of this Part 1. The Board may require such guaranty or bond as it may deem necessary to insure compliance with conditions imposed.*
- C. If an application for a variance is denied, the Board shall take no further action on another application for substantially the same relief until after two (2) years from the date of such disapproval.”*

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Section 267-49A(1) Harford County Code states:

A. Eligibility. Housing for the elderly shall have the following requirements:

(1) In the B3 and CI Districts, the minimum lot size shall be ten acres. In the R1, R2, R3, R4, VR, and VR Districts, the minimum lot size shall be four acres.

LOT is defined by the Harford County Code at Section 267-4, Definitions, as follows:

“Lot - a designated area of land established by plat, subdivision or is otherwise permitted by law to used, developed or built upon as a unit.”

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The Applicant is requesting permission to construct a housing for the elderly project on a parcel of land less than 10 acres in size in a B3 District. By Code, the minimum lot size must be 10 acres. The project proposed by the Applicant would consist of four (4) buildings of twelve (12) residential units each, with adequate parking, adequate access to U.S. Route 1, and in close proximity to existing or proposed uses which may help to service the population of the new community. Testimony was also to the effect that there would be no adverse traffic impact on Route 1. This testimony and representations are accepted as fact.

There was further testimony that the proposed project would meet all other applicable County standards, and while the height of the project would be somewhat greater than other surrounding uses, that characteristic would cause no harm. This testimony is accepted.

There was further testimony that the proposed project would have less of an impact on the surrounding neighborhood than some other uses that could be made of this B3 zoned property. This testimony is also accepted as a fact.

Indeed, there is no serious dispute concerning the physical characteristics of the proposed project, or its impact on the surrounding neighborhood, or that all applicable standards can be met, except for the 10 acre minimum lot requirement.

Initially, it is found that the representation of the Applicant that its available parcel size is 4.82 acres is incorrect. The Harford County Development Regulations define lot as:

“Lot - a designated area of land established by plat, subdivision or is otherwise permitted by law to used, developed or built upon as a unit.”

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No doubt the Department of Planning and Zoning was cognizant of that definition when it originally required all 4 parcels - Lots 3, 4, the private drive, and the storm water management facility - to be combined into one lot. The Applicant indicated that it cannot do so. Accordingly, the Applicant will, presumably, have a combined parcel of 3.307 acres, being Lots 3 & 4, which will be serviced by a storm water management facility and private roadway. The acreage of these service facilities cannot be combined into the lot calculation of the Applicant, and accordingly, its total resulting lot size for which approval is sought will be about 3.307 acres. It is, however, unnecessary for the purposes of this decision, to determine if this reduced lot size impacts any of the applicable special development requirements.

The substance of the Applicant's argument is that the property is irregular in shape, is zoned B3, is surrounded on three sides by residential zoning and uses, and accordingly constitutes a good transition between residential and commercial uses. The proposed use is also benign compared to many other allowable uses.

In reviewing this request, the variance provision of Section 267-11 must be examined.

Initially, it is necessary to determine if by reason of the property's uniqueness or topographical conditions, the Applicant would suffer practical difficulty or unreasonable hardship if the Code were literally enforced. This is a multi-step process, the first of which is to determine if there is any uniqueness of the property or topographical conditions. In this regard guidance has been provided by Maryland Courts, most prominently by the Court of Special Appeals in North v. St. Mary's County, 99 Md. App. 512 (1994) which held in addressing uniqueness:

“ . . . ‘uniqueness’ of a property for zoning purposes requires that the subject property have an inherent characteristic not shared by other properties in the area, i.e., its shape, topography, subsurface condition, environmental factors, historical significance, access or non-access to navigable waters, practical restrictions imposed by abutting properties such as obstructions or similar restrictions.”

Further addressing this general requirement of uniqueness is Ad + Soil, Inc. v. County Commissioners, 307 Md. 307 (1986).

Cromwell v. Ward, 102 Md. App. 691 (1995) also stated:

“It is fundamental that the difficulties or hardships must be unique to justify a variance; they must be peculiar to the application of zoning restrictions to particular property and not general in character It is not uniqueness of the plight of the owner, but uniqueness of the land causing the plight, which is the criterion. . . the hardship (in order to justify a variance, however,) . . . must relate to the particular property of the applicant”

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The Applicant makes an unsuccessful effort to define his property as unique or unusual. No attempt was made to apply any of the characteristics enunciated by North to the subject property. Mr. Cunningham indicated that the property was unique in shape. This was simply a conclusory statement with no attempt to provide an explanation, add detail to the opinion, or to draw comparisons between the shape of the property and any other property either within or without the property's neighborhood. A review of the plat of the property indicates no particularly unique configuration, nor does the Staff Report support a finding of uniqueness of configuration other than, again, a simple conclusory statement. No testimony or other evidence was presented that otherwise allowable uses are impossible because of the properties' configuration. No suggestion was made that the site's configuration causes a hardship if the Development Regulations were applied without the requested variance. Such unsubstantiated conclusions as to uniqueness of configuration are not persuasive.

Furthermore, the argument that the property is unique because it is surrounded by both residential and commercial uses, must also fail. Harford County contains many examples of residential and commercial properties lying adjacent to one another. This fact is not an unusual characteristic. It is in fact a characteristic exhibited by property lying as close as directly across MD Route 152 from the subject property. (See Harford County Zoning Maps introduced by Applicant.)

That this use may be a good transition between existing residential and commercial uses, or is a "benign" use, may be true. However, those observations are not relevant to a consideration of uniqueness, only to impact.

Furthermore, even if determined to be unique, there must be a showing and finding that the literal enforcement of the Development Regulations - that is, the requirement that the Applicant have a 10 acre minimum lot size - would, consequently result in practical difficulty or unreasonable hardship. Again, the Applicant fails to make this showing. The property, apparently, remains fully usable for other purposes. The Harford County Development Regulations has a long list of principal permitted uses and special exceptions in a B3 district. Neither the Applicant or any of his witnesses made a showing that the property had characteristics of some nature which restrict the Applicant's ability to develop the property for principal permitted uses. Again, Mr. Cunningham opined that its use for some commercial purposes would be difficult because of surrounding residential uses. However, he gave no explanation, substantiation, or even examples to support the opinion. While certainly some commercial uses are not best neighbors to residential uses, the Code nevertheless allows such uses. While certain uses may be more desirable than others, that is not a legally sufficient reason for the granting of a variance.

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Furthermore, the additional reasons given by the Applicant and the Department of Planning and Zoning that the use of this commercial property for residential purposes will act as a good “transition” between commercial and residential is neither a unique feature of the property, nor a factor to be considered when determining whether there is a resulting practical difficulty by literal enforcement of the Code. Even if it were found that residential uses of the subject property would be a good transitional use, there are other types of residential housing allowed by the Code which are principal permitted uses in a B3 district, such as single family detached dwellings and duplex dwellings, which do not require a variance. Furthermore, such an argument goes to impact, not uniqueness or practical difficulty.

It is found that the most clearly stated reason for the variance was given by Mr. Wolf, who simply said that he cannot develop the property as he wishes without the variance. Such a difficulty is not, of course, the type of problem which rises to the level necessary to meet the standards of Section 267-11.

There was a continuing suggestion during the hearing, and in the Staff Report, that this is a “good use” and should be allowed for that reason. The impact of a proposed use may be undesirable, neutral, or it may be good. However, that is not a factor which can be considered in determining either uniqueness or resulting practical difficulty and/or unreasonable hardship. The project may, indeed, have beneficial impacts, but there was no testimony that other uses, including principal permitted uses, would not be as beneficial, if not more so, than the proposed project. In any event, as pointed out above, such findings go to impact only.

The request by the Applicant would, if granted, reduce the required 10 acre lot size by well over fifty percent (50%). The evidence presented does not support such a significant deviation from the provisions of the Development Regulations.

CONCLUSION:

For the above reasons, the requested variance is denied.

Date: May 21, 2004

ROBERT F. KAHOE, JR.
Zoning Hearing Examiner